Supreme Court, U.S.
FILED
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No. 98-1512

In The

Supreme Court of the United States

October Term, 1998

SANTA MONICA BEACH, LTD.,

Petitioner,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent.

SANTA MONICA RENT CONTROL BOARD,

Real Party in Interest.

On Petition For Writ Of Certiorari To The California Supreme Court

REAL PARTY IN INTEREST'S BRIEF IN OPPOSITION

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31 pp

Real Party's Restatement of the Question Presented

Whether the "essential nexus" and "rough proportionality" standards established by this Court in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), in the context of property exactions, should be extended generally to regulatory takings cases whenever a claimant challenges the policy or effectiveness of legislation affecting a broad class?

List of Parties

The Petition does not state the parties to the proceeding below. They are Petitioner Santa Monica Beach, Ltd., a limited partnership, Respondent Superior Court of Los Angeles County, and Real Party in Interest Santa Monica Rent Control Board.

The First Amended Complaint in the Superior Court named as real parties in interest the following tenants: Dennis Power, David Cooper, Dennis Sevier, Robert Grossbard, Dorothy Constantine, Margarete Hell, Igor Medzhibovsky, Daniel Wax, Michael Hammerschmidt, Hai Vu, Christopher Cuse, Nadine Cuse, and Timothy Block.

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REAL PARTY IN INTEREST'S BRIEF IN OPPOSITION

Real Party in Interest, Santa Monica Rent Control Board ("Board"), respectfully requests that this Court deny the Petition for Writ of Certiorari filed by Santa Monica Beach, Ltd. ("Petitioner").

JURISDICTION

Petitioner claims jurisdiction under 28 U.S.C. § 1257(a). Real Party in Interest disputes this basis for jurisdiction on the ground that no "final judgment" has been rendered by the state courts.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

In addition to those stated in the Petition, the following statute is involved:

Title 28, United States Code, Section 1257(a) states in pertinent part: "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States . . . "

INTRODUCTION

This is a facial attack to a rent control law premised on the theory that the law fails to "substantially advance legitimate state interests." Rent control laws have come before this Court several times in recent years and have been upheld on each occasion. Accordingly, the Petition for Certiorari attempts to carve out a new legal theory for attack. This theory, however, would disturb decades of

settled takings jurisprudence and improperly subject every species of economic regulation to searching and constant judicial inquiry.

Petitioner asks this Court to adopt the following rule: the takings clause, unlike the due process clause, requires a close nexus between legislative means and ends for all economic regulation. While a related standard has been adopted in a narrow category of cases involving land use exactions, Petitioner now asks the Court to generalize it.

Heightened judicial scrutiny in land use exaction cases makes sense, because government conditions a discretionary permit on an applicant's concession of a possessory use of his property by strangers. This sort of "regulatory leveraging" invites abuses of the police power unless a close nexus between the permit and concession is shown.

No similar justification for heightened scrutiny applies to economic regulation in general, whether it is zoning, business regulation, or price control. The case law in this area recognizes that state and local legislatures make hundreds of policy decisions every day respecting social objectives and regulatory means. The "rational basis test" employed in such cases responds to the separation of powers concerns that would arise if courts routinely examined those policy choices for proof of their efficacy.

Petitioner rejects this precedent. It believes that "a decade of reinvigorated takings jurisprudence," Pet. at 14, makes its legal theory ripe for adoption by this Court. However, Petitioner has misread this jurisprudence and its significance outside the context of land use exactions. It has similarly misread cases from other courts to construct a conflict, one which disappears on close examination, leaving only the well established rule that rejects heightened scrutiny for general land use and price controls. There is no

need to revisit takings clause doctrine that has been settled for the past sixty years.

Even if further clarification of takings doctrine were necessary, this case would not be an appropriate vehicle for doing so. The case comes to this Court by way of an interlocutory appeal from partial dismissal of a multi-count complaint. While interlocutory review may have been appropriate in California courts, it is not in this Court since there is no final judgment. An "inextricably related" claim remains pending in the trial court through which Petitioner can obtain all the relief it seeks in the case.

Finally, the case is time barred. Although the California Supreme Court declined to reach the question, App. A-8, the law on this point is clear. Petitioner's claim was filed more than sixteen years after enactment of the challenged law. Even if this facial case accrued some years later, based on changed circumstances, the last such fact alleged in the complaint occurred five years before filing. In either event, this case is barred.

STATEMENT OF THE CASE

The Rent Control Law challenged in this case was adopted by the voters of Santa Monica in April, 1979. Twelve years later, Petitioner acquired a 12-unit apartment building in Santa Monica.[1] In addition to receiving automatic annual rent increases applicable throughout the City, Petitioner filed two applications for supplemental rent increases with the Board. The first, in 1992, is not before

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[1] Petitioner never alleged the date of its property acquisition. It is a matter of public record, however, and easily accessible through the Lexis database *CA Deed Transfers, Tax Assessor Records and Mortgage Records.* Real Party in Interest requests this Court take judicial notice of the date of acquisition, Dec. 17, 1991, pursuant to Fed. R. Evid. 201(b)(2).

the Court.[2] In March, 1993, Petitioner filed a second application for rent increase which was granted in substantial part.

In addition to requesting a rent increase, Petitioner's 1993 application claimed that the 1979 Rent Control Law effected a regulatory taking of property. That claim was denied. Petitioner then sought judicial review of the Board's decision by way of Petition for Writ of Administrative Mandamus under California Code of Civil Procedure § 1094.5.

In its First Amended Complaint, filed on May 15, 1995, Petitioner added a claim for Inverse Condemnation to its mandamus action. App. E-1. Both claims alleged that the 1979 law failed to "substantially advance a legitimate government interest" under *Nollan v. California Coastal Comm'n,* 483 U.S. 825 (1987), and therefore caused a "regulatory taking." App. E-7, E-10.

Petitioner alleged, *inter alia*, that rent control had caused gentrification in Santa Monica, with an attendant loss of low-income households. App. E-4. It further alleged that if rents had been unregulated (*i.e.*, higher), more low-income renters would remain in the City. App. E-8. Accordingly, under this theory, the Rent Control Law failed to achieve one of its stated purposes – to protect "the poor, minorities, students, young families, and senior citizens." App. F-1. Such a failure, Petitioner alleged, constitutes a regulatory taking, for which the Board must pay just compensation. App. E-9.

The Board demurred to the inverse condemnation claim, asserting that the heightened relational standard of

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[2] Petitioner apparently abandoned its first application on appeal. *See* App. E-5-6. In any event, allegations relating to the March, 1992 rent increase application are irrelevant to the present controversy.

Nollan and *Dolan v. City of Tigard,* 512 U.S. 374 (1994), was inapplicable to normal regulatory action. App. A-6. The Superior Court granted the demurrer without leave to amend on Oct. 20, 1995. App. C-1. The court ruled that the "rational basis test" applied, App. D-4, since Petitioner had not alleged substantial economic injury or an exaction of property.

Rather than proceeding to trial on its administrative mandamus claim, Petitioner filed a Petition for Writ of Mandate in the California Court of Appeal, as a means of obtaining interlocutory review of the dismissed claim. The court issued its decision on March 20, 1996, holding that the heightened scrutiny standard of *Nollan* applies in all regulatory takings cases. App. B-13. The court vacated the demurrer granted by the trial court and remanded the inverse condemnation claim for trial. App. B-18.

The California Supreme Court granted review on May 29, 1996, and issued its decision on January 4, 1999. The court reversed the judgment of the Court of Appeal and reinstated the judgment of the trial court. The court held that "Petitioner remains free to proceed with its administrative mandamus action alleging that the Board exceeded its legal authority under the [Rent Control Law] and that the Board's rulings deprived Petitioner of a fair return." App. A-27.

The court read the decisions in *Nollan* and *Dolan* as establishing "essential nexus" and "rough proportionality" tests under the takings clause to "government requirements that property owners dedicate land as a condition of receiving a development permit." App. A-14. The court noted that the higher relational standards of *Nollan* and *Dolan* "cannot be readily transplanted outside the context of exactions," *id.*, and further noted that this Court has consistently declined to do so. App. A-16-18.

Petitioner's administrative mandamus claim remains dormant in the trial court five years after filing. The principal allegation contained therein is that the Rent Control Law is "invalid as a regulatory taking of private property." App. E-10. This claim is unaffected by the decision of the California Supreme Court except insofar as it relies on the substantially advancing prong of *Nollan* and *Dolan*. In other words, the decision below precludes one of Petitioner's theories, but does not finally adjudge the case.

REASONS FOR DENYING THE WRIT

I

THERE IS NO FINAL JUDGMENT

This Court has jurisdiction to review "final judgments or decrees rendered by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257(a).

> "This provision establishes a firm final judgment rule. To be reviewable by this Court, a state-court judgment must be final 'in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court.' "

Jefferson v. City of Tarrant, 522 U.S. 75, 118 S. Ct. 481, 486 (1997) (citation omitted).

A. A Takings Claim Remains Unadjudicated in the Trial Court

The Petition seeks a writ of certiorari directed to the California Supreme Court to review its decision upholding

a demurrer to one claim of a two-claim complaint. The matter reached the state appellate courts by way of Petition for Writ of Mandate under Cal. Code Civ. Proc. § 1085, *et seq*. This is a customary mechanism in California to review interim orders that are not otherwise appealable because not final judgments. *See Morehart v. County of Santa Barbara*, 7 Cal. 4th 725, 743 (1994) (interlocutory judgment resolving fewer than all of plaintiff's causes of action is not appealable); *In re Matthews C.*, 6 Cal. 4th 386, 393 (1993). Review by writ is discretionary, especially at the pleading stage of a lawsuit. *Taylor v. Stille*, 24 Cal. 3d 890, 893 (1979). Review is appropriate where an interim order presents "significant legal" issues. *Babb v. Superior Court*, 3 Cal. 3d 841, 851 (1971). Yet, it is still an interlocutory review of a case which is "not final," *Morehart*, 7 Cal. 4th at 764, either under California procedure or for purposes of 28 U.S.C. § 1257(a).[3]

Because of the California Supreme Court's disposition of Petitioner's inverse condemnation claim, that decision is not subject to "further review or correction in any other state tribunal," and is therefore final within the first meaning of § 1257. But, it is not a final "determination of the litigation" as required by the second meaning of the statute.

Both the dismissed and remaining claims allege a regulatory taking. App. E-7, E-10. They rely on the same factual allegations, App. E-7, E-9, and seek similar relief –

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[3] Although the writ of mandate proceeding initiated in the California Court of Appeal is nominally a separate case, it is not the type that this Court has found sufficient under Section 1257. *Compare Fisher v. District Court*, 424 U.S. 382, 385, n.7 (1976) ("The writ of supervisory control issued by the Montana Supreme Court is a final judgment within our jurisdiction [because that] original proceeding . . . is not equivalent to an appeal . . . the only issue decided concerns the jurisdiction of a lower state court") (citations omitted).

compensation and invalidation of the law. App. E-13. Indeed, "[d]amages for the "taking" may be sought in an administrative mandamus action (Code Civ. Proc., § 1095)." *Hensler v. City of Glendale*, 8 Cal. 4th 1, 14 (1994).[4] Petitioner's two claims are therefore related, App. B-8, differing only in their underlying theories.

Accordingly, Petitioner's takings case is not over. The decision below merely dismisses one avenue of recovery because it was predicated on a novel theory of law not adopted by this Court or California courts. The traditional elements of Petitioner's taking claim remain pending in the trial court. *Cf. id.* at 15 ("the trial court is able to resolve the taking claim in the mandate proceeding").

This case is similar to and controlled by *San Diego Gas & Electric v. City of San Diego*, 450 U.S. 621 (1981). There, the California Court of Appeal (upon direction of the state Supreme Court) ruled that damages were unavailable for a regulatory taking of property and that the sole remedy was invalidation through mandamus or declaratory relief. This Court expressed doubt at the time regarding the correctness of this ruling, *id.* at 633, and has subsequently rejected it, *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987). Nonetheless, the Court held the issue was not ripe for review.

> "The Court of Appeal has decided that monetary compensation is not an appropriate remedy for

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[4] California Code of Civil Procedure § 1095 states in relevant part: "If judgment be given for the applicant, the applicant may recover the damages which the applicant has sustained, as found by the jury, or as may be determined by the court or referee, upon a reference to be ordered, together with costs; and a peremptory mandate must also be awarded without delay. Damages and costs may be enforced in the manner provided for money judgments generally."

> any taking of appellant's property that may have occurred, but it has not decided whether any other remedy is available because it has not decided whether any taking in fact has occurred. Thus, however we might rule with respect to the Court of Appeal's decision that appellant is not entitled to a monetary remedy – and we are frank to say that the federal constitutional aspects of that issue are not to be cast aside lightly – further proceedings are necessary to resolve the federal question whether there has been a taking at all. The court's decision, therefore, is not final, and we are without jurisdiction to review it."

450 U.S. at 633.

This case is also factually similar to *Jefferson v. City of Tarrant*. There, the Alabama Supreme Court sustained an objection to a Section 1983 claim, and thereafter remanded the case to the trial court for further proceedings.

> "Far from terminating the litigation, the [Alabama Supreme] court answered a single certified question that affected only two of the four counts in petitioners' complaint. The court then remanded the case for further proceedings. Absent settlement or further dispositive motions, the proceedings on remand will include a trial on the merits of the state-law claims."

118 S. Ct. at 483.

B. None of the Exceptions to the Final Judgment Rule Applies

This is not a case in which "the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." *Cox Broadcasting Corp. v. Cohn*, 420

U.S. 469, 480 (1975). As in *Jefferson*, "[r]esolution of the state-law claims could effectively moot the federal-law question raised here." 118 S. Ct. at 483. If Petitioner prevails on its state mandamus claim, because either the Rent Control Law constitutes a regulatory taking (under settled standards), or the Board exceeded its statutory authority, App. E-10-12, it will obtain full relief.

Nor is this an instance "where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Cox*, 420 U.S. at 481. Admittedly, trial of the regulatory taking allegation in Petitioner's mandamus claim will proceed, if at all, using traditional Fifth Amendment standards. And, presumably, that will be "law of the case" on appeal in the California state courts. Nonetheless, ultimate review could still be had in this Court, as the state courts' "determination will in no way limit [this Court's] ability to review the issue on final judgment." *Jefferson*, 118 S. Ct. at 483.

The third exception under *Cox* – "the federal issue is conclusive or the outcome of further proceedings preordained," 420 U.S. at 478 – likewise does not arise here. Petitioner will be required to go to trial on his complaint no matter how the "substantially advancing" issue is resolved. For the same reason, the fourth exception fails. That occurs where "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action." *Id.* at 482-83.

Common to all the exceptions under *Cox* is that "additional proceedings would not require the decision of other federal questions that might also require review by the Court at a later date." 420 U.S. at 477-78. Yet, in this case, either party if unsuccessful can bring the takings issue before this Court at a later and more appropriate time. *See*

San Diego Gas & Electric, 450 U.S. at 636 (Rehnquist, J. concurring).

II.

PETITIONER'S INVERSE CONDEMNATION CLAIM IS TIME BARRED

Petitioner's inverse condemnation claim alleges a violation of the Fifth Amendment.[5] App. E-7. Because it is a federal claim, it is governed by the applicable federal statute of limitations. Here, however, the federal right does not provide a statute of limitations. In such situations, federal courts generally adopt the analogous state statute of limitations. *See Wilson v. Garcia*, 471 U.S. 261, 266-67 (1985).

Petitioner filed its inverse condemnation claim on May 15, 1995, sixteen years after the Rent Control Law was enacted. Assuming that Petitioner's cause of action may have accrued sometime thereafter, because of changed circumstances, the events complained of occurred sometime "between 1980 and 1990." App. E-3-4. Since California's statute of limitations for facial claims for inverse condemnation is five years, App. A-7, the complaint is time barred no matter when the cause of action accrued. Indeed, recent Ninth Circuit authority sets the California limitations period at one year. *See Golden Gate Hotel Ass'n v. San Francisco,* 18 F.3d 1482, 1486 (9th Cir. 1994) (one year limitation applies to facial taking claim which accrued when ordinance was enacted).

Petitioner attempts to evade this fatal defect by characterizing its case as an *as-applied* challenge. Pet. at i, 3. However, none of the allegations forming the basis for

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[5] It also alleges a violation of a comparable provision in the California Constitution, Art. I. § 19, which is not before this Court.

Petitioner's claim allege any impact on its own property. Rather, the complaint compares certain City-wide demographics between the 1980 census and the 1990 census which, Petitioner contends, prove the Rent Control Law is ineffective in meeting its goals.

In order to make an *as-applied* taking claim, a party must allege facts showing "the particular impact of government action on a specific piece of property requires the payment of just compensation." *Keystone Bituminous Coal Ass'n v. De Benedictis,* 480 U.S. 470, 494 (1987). By contrast, the issue in a facial challenge is the effect of the statute itself. *Id. See also Pennell v. City of San Jose*, 485 U.S. 1, 18 (1988) (Scalia, J., concurring and dissenting) (analysis of whether a law substantially advances a legitimate state interest is facial in nature). Petitioner's allegations are a classic example of a *facial* attack, since they purport to describe the effect of the law itself and not any particularized impact on its property.[6]

Petitioner's administrative mandamus claim, still pending below, was timely filed. *See* Cal. Code Civ. Proc. § 1094.6. But the claim it brings to this Court was not.

III.

THE STANDARD FOR REVIEW OF PRICE CONTROL REGULATIONS (INCLUDING RENT CONTROL) IS WELL SETTLED; THERE IS NO NEED FOR FURTHER GUIDANCE FROM THIS COURT

The Petition for Certiorari paints a picture of disarray in the lower courts concerning the standard of review

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[6] Because Petitioner has mounted a facial challenge to a law in existence at the time it acquired the property, it may lack standing in this case. *See Pennell*, 458 U.S. at 8, n.4.

applicable under the takings clause to economic regulation. Any uncertainty, however, is more illusory than real. As we show below, this Court's pronouncements have been clear, and were correctly applied by the California Supreme Court in its decision.

A. The Petition Rejects the Central Inquiry in Regulatory Takings Cases – The Challenged Law's Economic Impact

This Court has identified three factors of "particular significance" in its takings cases – "the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action." *Kaiser-Aetna v. United States*, 444 U.S. 164, 175 (1979).

Most takings decisions are based on these factors. The first two are essentially economic inquiries and form the basis for analysis in regulatory takings cases. The third – the character of governmental action – speaks to the special case of "physical invasion by government," *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978), or comparable destruction of critical property rights. *See Hodel v. Irving*, 481 U.S. 704, 715-16 (1987); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

Petitioner, however, invoked none of these factors, either in the lower courts or here. Instead, Petitioner seeks review of the constitutionality *vel non* of rent control. It does so by relying on abstract principles rather than the specific tests carefully crafted by this Court. Its ostensible justification is that "[r]ent control differs from and cannot be equated to other forms of price control . . . . [Therefore,] decisions upholding other forms of price control are [not] authority for rejecting a takings clause challenge to a rent

control ordinance." Pet. at 9-10 (quoting App. A-56-57 (Baxter, J., dissenting)).

The constitutionality of rent control is not an open question after 78 years of decisions, given its affirmance by this Court no fewer than a half-dozen times since *Block v. Hirsch*, 256 U.S. 135, 156 (1921). Indeed, the Court has been quite clear – "statutes regulating the economic relations of landlords and tenants are not per se takings." *FCC v. Florida Power Corp.*, 480 U.S. 245, 252 (1987). *See also Loretto*, 458 U.S. at 440 ("[t]his Court has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails"); *Pennell*, 485 U.S. at 12, n.6 ("we see no need to reconsider the constitutionality of rent control *per se*").

Should the constitutionality of rent control be revisited by this Court, this is not a suitable case for doing so, since it is not premised on economic injury or other factor that distinguishes the Petition from the myriad other cases challenging the policy justification for rent control.[7]

B. Petitioner Seeks to Introduce Substantive Due Process Elements Into the Takings Clause, Thereby Undoing this Court's Efforts to Maintain Conceptual Distance Between the Clauses.

Rent control is a form of price control which, like other economic regulation, can be analyzed under either the takings or due process clauses. *See, e.g., Yee v. City of Escondido*, 503 U.S. 519, 532 (1992). The two clauses

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[7] Nor does this case present the type of severe retroactive exactions found in *Eastern Enterprises v. Apfel*, 118 S. Ct. 2131 (1998).

serve different purposes and employ different standards. *See Pennell*, 485 U.S. at 15 (Scalia, J., concurring and dissenting); *Nollan*, 483 U.S. at 835, n.3.

The distinction between the two clauses has not always been clear. Early in the century, this Court's opinions often used the clauses interchangeably, or failed to indicate which was involved in its analysis. *See Chastleton v. Sinclair*, 264 U.S. 543 (1924) (no clause identified); *Block v. Hirsch*, 256 U.S. at 156 (intermingling of takings and due process clauses). To some extent, the interplay between the clauses was unavoidable. The takings clause, after all, is made applicable to the states by way of incorporation through the Fourteenth Amendment's due process clause. *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 239 (1897).

For the last sixty years, however, this Court has endeavored to distinguish between the clauses and has generally rested its review of land use regulations and price control on the takings clause. *See Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1988). Where both clauses are invoked by a complaining party, the Court has expressly declined to treat them as interchangeable. *See, e.g., Pennell*, 485 U.S. at 13; *Yee*, 503 U.S. at 532.

In *Agins v. City of Tiburon*, 447 U.S. 255 (1980), the Court stated:

> "The application of a general zoning law to particular property effects a taking if the ordinance does not *substantially advance* legitimate state interests, *see Nectow v. Cambridge*, 277 U.S. 183, 188 (1928), or denies an owner economically viable use of his land, *see Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 138, n. 36 (1978)."

447 U.S. at 260 (emphasis added).

The "substantially advancing" component is, of course, a means-ends inquiry. Its due process pedigree is apparent from *Agins'* reference to *Nectow*, a substantive due process case. As a result, some read *Agins* as merging the due process and takings clauses, with the "substantially advancing" prong as potent a limitation on economic regulation as the requirement of viable economic use.

But that has not proven to be the case. Rather, this Court's decisions have focused almost entirely on economic impact when reviewing regulatory takings. This is as it should be. The entire premise of regulatory takings theory, according to Justice Holmes, is to guard against police power enactments which extinguish property; *i.e.*, those that have "very nearly the same effect for constitutional purposes as appropriating or destroying it." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922).

To the extent a means-ends inquiry remains part of regulatory takings, it is employed using deferential rational basis review. It would make no sense to do otherwise. No rationale can explain why a takings clause test borrowed from economic due process should continue to employ *Lochner* era standards (*cf. Lochner v. New York*, 198 U.S. 45 (1905)), while the due process clause itself has matured into a minimal restraint on regulatory action. *See Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 223 (1986) ("it would be surprising indeed to discover that [a law that survived economic due process analysis] effected a taking").

C. This Case Does Not Fall into The Narrow Category of Unconstitutional Conditions Which Require an "Essential Nexus" and "Rough Proportionality."

This Court has identified a single exception to rationality review under the takings clause. That is for land use

exactions involving physical occupations. Land use exactions are a special case of "unconstitutional conditions."

The "substantially advancing" test received its first full airing from this Court in *Nollan*. There, the California Coastal Commission had granted a discretionary development permit conditioned on the owner's surrender of a piece of his property – a lateral easement across his beachfront. Standing alone, the condition would have been unconstitutional. 483 U.S. at 837 (the "permanent grant of continuous access to the property, would have to be considered a taking if it were not attached to a development permit"). Such a condition passes constitutional muster, however, if it "serves the same governmental purpose" as the underlying regulation (in *Nollan*, to preserve view easements). *Id.* In other words, if the Commission could have denied the permit outright, giving the "owner an alternative to that prohibition which accomplishes the same purpose is not [unconstitutional]." *Id.*

Thus, the distinction between a constitutional and unconstitutional permit condition is whether the condition tracks the regulatory purpose. As Justice Scalia noted, absent a close fit between the two, "the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.' " *Id.* This, then, is the backdrop and predicate for close scrutiny under the "substantially advancing" prong. It is limited to discretionary permits containing conditions which are otherwise unconstitutional.

The limited use of close scrutiny under the "substantially advancing" prong was confirmed in *Dolan*. As in *Nollan*, the condition imposed – dedication of land – standing by itself, would have resulted in a taking. 114 S. Ct. at 2316. Because of this feature, the traditional economic impact analysis used in most land-use cases was not dispositive. Chief Justice Rehnquist explained:

> "[Typical] land use regulations . . . differ in two relevant particulars from the present case. First, they involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. Second, the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city. In Nollan, supra, we held that governmental authority to exact such a condition was circumscribed by the Fifth and Fourteenth Amendments. Under the well-settled doctrine of "unconstitutional conditions," the government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government where the property sought has little or no relationship to the benefit.

Id. at 2316-17.

The present case is a far cry from the conditional permits in *Nollan* and *Dolan*, which gave rise to the requirements of "essential nexus" and "rough proportionality." There is no dedication or other exaction which is independently unconstitutional. There is also no permit involved, which could serve as the basis for improper "regulatory leveraging." *Cf. Nollan*, 483 U.S. at 841. Finally, application of the Rent Control Law to Petitioner is not an individualized discretionary action. *See Dolan*, 512 U.S. at 385. Petitioner complains that the legislative decision enacting rent control for the entire City lacks foundation.

Petitioner does not contend that it can prevail on its claim if the traditional standard is used for determining

"substantial advancement." Its avoidance is well advised, for this Court has consistently affirmed a legitimate public purpose for rent control. *See Block v. Hirsh*, 256 U.S. at 156 (1921) ("all the elements of a public interest" are present); *Bowles v. Willingham*, 321 U.S. 503, 513, n.9 (1944) (rent control advances a legitimate public purpose); *Pennell*, 485 U.S. at 13.

D. The Demurrer Was Properly Sustained Irrespective of the Standard of Review On Petitioner's Inverse Condemnation Claim.

Petitioner argues that, for purposes of this appeal, the facts in its complaint "must be deemed proven." Pet. at 17. That is true for evidentiary facts, but not for legal conclusions, such as whether the Rent Control Law has a sufficiently close nexus to a public purpose.[8] Moreover, Petitioner poses that ultimate question in two distinct ways, thereby clouding the precise issue before the Court.

To make the case attractive for review, Petitioner posits the relational (nexus) standard in general terms, and cites to statements in opinions below asking for guidance on whether to apply *Nollan* and *Dolan* outside of exactions. Pet. at 8, 17-18. But attempting to avoid the statute of limitations problem, Petitioner posits this is an *as-applied* challenge, not a *facial* one. App. A-7-8. Accordingly, it

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[8] *See Moore v. Regents of the University of California*, 51 Cal. 3d 120, 125 (1990) ("in reviewing a ruling on a demurrer . . . we assume that the complaint's properly pleaded material allegations are true and give the complaint a reasonable interpretation by reading it as a whole and all its parts in their context. We do not, however, assume the truth of contentions, deductions, or conclusions of fact or law") (internal citations omitted); *Agins*, 447 U.S. at 259, n.6 (California Supreme Court's treatment of allegations on a demurrer "does not raise a federal question appropriate for review by this Court").

frames the question for this Court as whether "*application of the Rent Control Law [to Petitioner]* failed to advance . . . the legitimate policy objectives of the law." Pet. at 4 (emphasis added). *See also id.* at i.

Yet, none of the facts alleged in the First Amended Complaint go to the issue of whether the Rent Control Law, *applied to Petitioner's property*, does or does not assist "the poor, minorities, students, young families and senior citizens," or serves any other public purpose. Pet. at 5. Every fact alleged in the complaint is general to the population of Santa Monica as a whole. Nowhere does Petitioner describe the impact of rent control on tenants in its own building. App. E-3-4. *See also* Pet. at 4-5.

In other words, if this truly were an *as-applied* case, Petitioner would have to show the requisite "close nexus" is lacking between the regulatory decision below "and any public harm that might result from plaintiff's unregulated operation of the Property." App. E-8. Yet, as Petitioner's own authorities recognize, this requires allegations showing "the amount of public harm caused by the owner and the regulatory burden imposed." Pet. at 19-20 (citing Molly S. McUsic, *Looking Inside Out: Institutional Analysis and the Problem of Takings*, 92 Nw.U.L. Rev. 591, 602 (1998)). *See also* Pet. at 22 ("substantial advancement test 'requires a judicial assessment based on the facts of each owner's use' ") (citing McUsic). No such allegations appear.

Since not a single fact alleged in the complaint goes to the particular question presented, the demurrer was properly sustained quite apart from the correct standard of review for the "substantially advancing" prong of *Agins*.[9]

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[9] *See also* App. A-10, n.2 ("Petitioner does not allege with any particularity in its inverse condemnation claim that the Board's decisions denied it a fair return, reserving such allegation for the administrative mandamus action, which is not before us").

E. The Decision Below Does Not Conflict With the Cases Cited by Petitioner

Petitioner cites *Seawall Associates v. City of New York*, 74 N.Y.2d 92 (1989), *cert. denied*, 493 U.S. 976 (1989), and *Manocherian v. Lennox Hill Hospital*, 84 N.Y.2d 385 (1994), *cert. denied*, 514 U.S. 1109 (1995), for its contention that there is a conflict between the courts of California and New York regarding the standard of review in regulatory takings cases. Since these cases are distinguishable from the decision below, no conflict exists.

Seawall found facially unconstitutional a law which prohibited demolition or conversion of single room occupancy hotels and required owners to rehabilitate and rent every unit. 74 N.Y.2d at 99-100. The court found that the law affected a physical occupation because it denied an owner's right to possess and exclude others. The court distinguished typical rent control laws which do not result in a physical taking. *Id.* at 105.

Manocherian is similar. The law there transferred significant possessory rights to a small class of corporate tenants who could select and evict actual occupants of the premises. 84 N.Y.2d at 394. Again, the court distinguished typical rent control laws, stating: "by no means does our ruling affect or diminish the general validity of those broad, longstanding [rent control] protections and enactments." *Id.* at 398-99.

Nor does the decision below conflict with *Richardson v. City and County of Honolulu*, 124 F.3d 1150 (9th Cir. 1997), *cert. denied*, ___ U.S. ___, 119 S. Ct. 168 (1998). *Richardson* involved price caps and tenancy protection for condominium ground lessees. Because the lease savings inured to the benefit of owner-occupants who sell their units, rather than to new tenants, the court found the law failed to meet its goal of keeping housing affordable. *Id.* at

1163-66. The court distinguished the Hawaii law from "ordinary rent control ordinances," which do not produce such a premium. *Id.*

In sum, the cases on which Petitioner relies for its claim that review is needed in this Court are self-limiting. Because they distinguish themselves from ordinary economic regulation (including rent control), there is little likelihood that other courts will confuse them with the decision below.

CONCLUSION

By subjecting rent control to heightened judicial scrutiny, Petitioner seeks to supplant the legislature's economic judgments with its own. Thus, if it can convince a court or jury that rent control fails to serve a salutary public purpose, the law must be unconstitutional. This theory apparently succeeded in the California Court of Appeal. *See* App. B-17 ("the political objectives that are furthered by rent control are of dubious legitimacy") (citing R.S. Radford, *Regulatory Takings Law in the 1990's: The Death of Rent Control* (1992) 21 Sw.U.L.Rev. 1019, 1065)).

This is the stuff of economic substantive due process, whether now couched in the takings clause, or more accurately seen as resurrecting *Lochner v. New York*. Subjecting the "economic niceties" of price control, *Duquesne*, 488 U.S. at 314, to heightened judicial scrutiny would accomplish just that. This inquiry is inevitable if, as Petitioner demands, close judicial scrutiny of means and ends is required whenever the legislative basis or effectiveness of economic regulation is challenged under the takings clause.

Indeed, under Petitioner's theory, mere allegation of no substantial advancement should be enough to deter police power enactments. Perhaps this is why Petitioner believes it is unnecessary to adjudicate its remaining claim

in the trial court. But, the "finality rule is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system." *Jefferson*, 118 S. Ct. at 486 (citations omitted). In this case, it precludes interlocutory review of Petitioner's takings claim.

For the foregoing reasons, Real Party in Interest respectfully requests that the Petition be denied.

Dated: April 20, 1999

Respectfully submitted,

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